TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~480.~~ 228 47

MARGARET JACOWAY, ADMINISTRATOR OF BENJAMIN J. JACOWAY, DECEASED, PLAINTIFF IN ERROR,

vs.

TILFORD DENTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED JUNE 27, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 460.

MARGARET JACOWAY, ADMINISTRATOR OF BENJAMIN J. JACOWAY, DECEASED, PLAINTIFF IN ERROR,

vs.

TILFORD DENTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Arkansas, before you, or some of you, being the highest court of law or equity of the said State in which a decission could be had in the said court, between Tilford Denton and Margaret Jacoway, administratrix de bonis non of Benjamin J. Jacoway, deceased, when was drawn in question the right of a citizen of this State to recover for certain slaves sold, and bringing into controversy a statute of this State, &c., all of which appears by the record in this case, a manifest error hath happened, to the great damage of the said defendant, Jacoway, as by the record thereof appears, we, being willing that the error, if any
2 hath been committed, should be duly corrected, and fair and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgement be thereon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the first Monday of December, A. D. eighteen hundred and seventy (1870) next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 2nd day of June, A. D. 1870.

[SEAL.] CHA'S P. REDMOND,
Clerk of the United States Circuit Court
3 *for the Eastern District of Arkansas.*

Copy of this writ lodged in my office this 2d day of June, A. D. 1870.
N. W. COX,
Clerk Supreme Court State of Arkansas.

STATE OF ARKANSAS, *ss:*

This writ of error is allowed this 2nd day of June, A. D. 1870, a copy thereof having been this day lodged in the office of the supreme court of Arkansas.

W. W. WILSHIRE,
Chief Justice of the Supreme Court of the State of Arkansas.

4 To the Honorable W. W. Wilshire, chief justice of the supreme court of the State of Arkansas:

TILFORD DENTON *vs.* MARGARET JACOWAY, EX. OF BENJAM. J. Jacoway.	Supreme c't, Arkansas.

Comes the said Margarette Jacoway, as executrix of the estate of Benjamin J. Jacoway, deceased, and states that a judgement has been rendered against her for the sum of about eight thousand dollars in the supreme court of Arkansas, at the fall term thereof, A. D. 1869; that

the question involved therein was the right of a citizen to recover for the value of certain slaves sold by the said Denton to the said Jacoway, or, in other words, can obligations given for slaves be enforced, or the consideration money be collected? The construction and validity
5 of a clause in the constitution of the State of Arkansas is also involved, as being contrary to the Constitution of the United States; all of which will fully and at length appear by the transcript of the proceedings, pleadings, &c., in said case herewith filed.

O. H. GARLAND.

The prayer of the petitioner granted, and the writ of error will go as asked for.

Little Rock, Arkansas, May 27th, 1870.

W. W. WILSHIRE,
Chief Justice of the Supreme Court of the State of Arkansas.

6 MARGARET JACOWAY, ADMINISTRATRIX de bonis non of the estate of Benjamin J. Jacoway, dec.,
vs.
TILLFORD DENTON.

Supreme court of the State of Arkansas.

Know all men by these presents that we, Margaret Jacoway, W. D. Jacoway, J. S. Gully, H. M. Jacoway, S. L. Strayhorn, Cha's E. Phillips, G. L. Kimball, are held and firmly bound unto the clerk of the Supreme Court of the United States in the sum of five hundred dollars, to be paid to the said Tillford Denton, his heirs, executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this the 11th day of February, A. D. 1870.

Whereas the above-named Margaret Jacoway, as administratrix de bonis non of the estate of Benjamin J. Jacoway, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement in the above-entitled suit, rendered in the supreme court of Arkansas, now, therefore, the condition of this
7 obligation is such that if the above-named Margaret Jacoway shall prosecute said writ of error to effect, and answer all costs if she shall fail to make good her plea, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

Witness our hands and seals this the 11th day of February, 1870.

MARGARET JACOWAY.	[SEAL.]
W. D. JACOWAY.	[SEAL.]
J. S. GULLY.	[SEAL.]
H. M. JACOWAY.	[SEAL.]
S. L. STRAYHORN.	[SEAL.]
CHA'S E. PHILLIPS.	[SEAL.]
G. L. KIMBALL.	[SEAL.]

8 (Indorsed:) M. Jacoway, adm'x, to Tillford Denton. Bond for costs.

Bond approved May 27th, '70.

W. W. WILSHIRE,
Chief Justice Supreme Court of Arkansas.

Filed March 4, 1870.

N. W. COX, *Clk.*

9 UNITED STATES OF AMERICA, *ss:*

To Tilford Denton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington City, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Arkansas, wherein Margaret J. Jacoway, adm'r'x of the estate of Benj. J. Jacoway, is plaintiff, and you are defendant in error, and show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. W. Wilshire, chief justices of the supreme court of the State of Arkansas, this 27th day of May, A. D. 1870.

W. W. WILSHIRE,
Chief Justice.

10 Service is acknowledged of the foregoing.

H. F. THOMASON,
T. W. POUND,
Att'ys of recor. for defendant in error.

11 State of Arkansas, in supreme court thereof.

I, N. W. Cox, clerk of the supreme court of said State, do hereby certify that in obediance to the mandate of the within writ, I have made and certified a full, true, and complete transcript of the record and proceedings of said cause therein stated, which said transcript is hereto attached.

In testimony whereof I hereto set my hand as clerk of said supreme court, and affix the seal of said court, at my office, in the city of Little Rock, this day of June, 1870.

[SEAL.]

N. W. COX,
Clerk.

12 STATE of ARKANSAS, *set:*

At a term of the supreme court of the State of Arkansas, began and held at the supreme court room in the city of Little Rock, in said State, on Monday, the sixth day of December, A. D. 1869, the Hon. W. W. Wilshire, chief justice, presiding, among other proceedings had were the following, viz:

MONDAY, *December* 13, 1869.

MARGARET JACOWAY, ADM'X DE BONIS NON OF the estate of Benj. J. Jacoway, dec'd, appellant. *v.* TILFORD DENTON, appellee. } Appeal from Yell County.

Comes said appellant, by her attorney, and by leave of the court files the transcript of the proceedings of the Yell circuit court in this cause, and the said appellee comes not, but makes default herein; thereupon by leave of the court this cause is, upon the part of said appellant, submitted on briefs and by the court taken under advisement.

13 Said transcript is in the words and figures following, viz:

Pleas before the Honorable William N. May, judge of the Yell circuit court, on the 11th day of May, A. D. 1869, in the case of Tilford Denton, pl't'ff, versus Margaret Jacoway, as admr'x, &c., def't in debt.

Be it remembered that heretofore, to wit, on the 12th day of June, A. D. 1866, the said plaintiff, by H. F. Thomason, his attorney, filed in the office of the clerk of the said circuit court, his declaration in said case, which is in words and figures as follows, to wit:

Declaration.

STATE OF ARKANSAS, *County of Yell, ss:*

In the circuit court of said county, and to the September term, A. D. 1866.

Tilferd Denton, the plaintiff in this suit, by attorney, complains of William D. Jacoway, as administrator of all and singular the goods and chattels, rights and credits which were of Benjamin J. Jacoway,
14 deceased, at the time of his death, who died intestate, of a plea that he render to said plaintiff the sum of forty-five hundred dollars, with interest thereon, at the rate of ten per cent. per annum, from the fourth day of October, in the year of our Lord eighteen hundred and sixty-one, which he, the said defendant, as such administrator, owes to and unjustly detains from said plaintiff.

For that whereas the said Benjamin J. Jacoway, in his lifetime, to wit, on the 4th day of October, A. D. 1860, at, to wit, the county aforesaid, by his certain writing obligatory, sealed with his seal and signed by his abbreviated style of "B. J. Jacoway," and which said writing obligatory having been lost, the said plaintiff cannot produce the same to the court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, agreed to pay, twelve months after the date thereof, to said plaintiff or order, the said sum of forty-five hundred dollars for value received, "to draw ten per cent. from due till paid," meaning to draw interest at the rate of ten per cent. per annum from due until paid; yet the said Benjamin J. Jacoway, in his lifetime,
15 did not pay, nor has the said defendant, as administrator as aforesaid, since the death of the said Benjamin J. Jacoway, as yet paid the said sum of forty-five hundred dollars above demanded, or any part thereof, nor the interest thereon at the rate of ten per cent. per annum from the said 4th day of October, A. D. 1861, or any part of said interest, to the said plaintiff or to his order, according to the tenor and effect of the said writing obligatory, (although often requested so to do,) but the said Benjamin J. Jacoway, in his lifetime, so to do wholly neglected and refused, and the said administrator as aforesaid, ever since the death of the said Benjamin J. Jacoway, has hitherto wholly neglected and refused, and still refuses, to pay the same, or any part thereof, to the said plaintiff, to wit, at the county aforesaid, to the damage of the said plaintiff of ten thousand dollars, and therefore he brings his suit, &c.

H. F. THOMASON,
Att'y for Pl'ff.

16 *Affidavit to last note.*

STATE OF ARKANSAS,
County of Carroll:

I, Tilford Denton, after being duly sworn according to law, do say,

that I am the legal owner of a certain writing obligatory, of which the following is a true and correct copy:

Twelve months after date I will pay Tilford Denton, or order, forty-five hundred dollars for value received of him, as witness my hand and seal, to draw ten per cent. from due till paid, this 4th day of October, 1860.

B. J. JACOWAY. [SEAL.]

I further say, that said writing obligatory is now lost, or mislaid, and is beyond my control, and that the same has not been paid or in anywise satisfied.

TILFORD DENTON.

Sworn to and subscribed before me this 4th day of April, A. D. 1866.

G. J. CRUMP,
Clerk of Carroll Circuit Court.

STATE OF ARKANSAS,
County of Carroll:

I, Tilford Denton, after being duly sworn according to law, do
17 say, that nothing has been paid or delivered toward the satisfaction of the above demand, and that the sum of forty-five hundred dollars, together with the interest thereon, at the rate of ten per cent. per annum from the 4th day of October, 1861, above demanded, is justly due.

TILFORD DENTON.

Sworn to and subscribed before me this 4th day of April, 1866.

G. J. CRUMP,
Clerk of Carroll County Circuit Court.

Presented, examined, and disallowed April 18, 1866.

W. D. JACOWAY,
Adm'r of the Est. of B. J. Jacoway, Dec.

(Endorsement:) Filed this 12th day of June, A. D. 1866.

JOHN F. CHOATE, *Clerk*,
By JAMES D. GALT, *D. C.*

Clerk's summons.

STATE OF ARKANSAS, *County of Yell, ss:*

The State of Arkansas to the sheriff of the county of Yell, greeting:

You are hereby commanded to summon William D. Jacoway, as administrator of all and singular the goods and chattels, rights and
18 credits, which were of Benjamin J. Jacoway, deceased, at the time of his death, if he be found within your bailiwick, to appear the judge of our circuit court of Yell County, at the court-house in the county aforesaid, on the first day of our next September term, at a court to be holden on the second Monday, being the tenth of September next, then and there to answer Tilford Denton, to an action of debt for forty-five hundred dollars, wherein he lays his damages at ten thousand dollars, and that you make due return of this writ to our said court.

In testimony whereof I have hereunto set my hand as clerk of said circuit court, and affixed the seal of office, this 12th day of June, 1866.

[L. S.] JOHN F. CHOATE, *Clerk*,
By JAMES C. GALT, *D. Clerk.*

Sheriff's return.

(Endorsement:) I have this 5th day of July, 1866, at Yell County, duly served the within on the within named W. D. Jacoway, by reading the same in his presence and hearing.

W. H. FERGESON, *Sheriff.*

19 *Plea in abatement filed and withdrawn.—Cause continued.*

SATURDAY, 15*th Sept.*, 1866.

TILFORD DENTON, PLAINTIFF,
vs.
W. D. JACOWAY, ADM'R B. J. JACOWAY, DEC'D, defendant. } Debt.

Comes the parties by their respective attorneys, and the said defendant filed his plea in abatement, which by consent of parties withdrawn, and time is given to said defendant until the next term of this court to plead to plaintiff's action, to which time this cause is continued.

Case continued, &c.

SATURDAY, 16*th March*, 1867.

TILFORD DENTON, PLAINTIFF,
v.
W. D. JACOWAY, DEFENDANT. } Narr. in debt.

Comes the parties by their respective attorneys, and upon motion this cause is continued until the next term of this court, with leave to defendant to file pleas on or before the third day of the next term of this court.

WEDNESDAY, *Sept.* 11, 1867.

TILFORD DENTON
v.
W. D. JACOWAY, AS ADM'R. } Debt.

20 *Pleas filed.*

Now on this day comes the said defendant and files two special pleas of failure of consideration in this cause.

Plea No. 1.

STATE OF ARKANSAS, *County of Yell:*

In the Yell circuit court, and at the September term thereof, 1867, 11th Sept., A. D. 1867.

WILLIAM D. JACOWAY, AS ADM'R ESTATE BENjamin J. Jacoway, dec'd,
ats.
TILFORD DENTON.

Comes the said defendant and defends, &c., and says actio non, because, he says, the said writing obligatory, in said plaintiff's declaration mentioned, was made, executed, and delivered by his intestate, Benja-

min J. Jacoway, to said plaintiff on said 4th day of October, A. D. 1860, at the county of Crawford, in the State of Arkansas, to wit, at the county of Yell aforesaid, for and in consideration of the sale and delivery to him of three negro boys by the said plaintiff, named Henry, Gum, and Jeff; and the said plaintiff on said last-mentioned day, upon the sale and delivery of said negroes, represented to and covenanted with said Benjamin J. Jacoway, deceased, that said negroes were
21 slaves for life, which said representation and covenant of the said plaintiff to and with the said Benjamin J. Jacoway, deceased, is evidenced by the said plaintiff's writing obligatory, made, executed and delivered to the said Benjamin J. Jacoway, deceased, for and in consideration of the making, execution, and delivery of the said writing obligatory in the plaintiff's declaration mentioned, by the said Benjamin J. Jacoway on the said 4th day of October, A. D. 1860, in these words: "Rec'd of B. J. Jacoway, four thousand five hundred dollars in full for three negro boys, slaves for life, to wit, Henry, aged about twenty-one years; Gum, aged about eighteen and Jeff, aged about seventeen. I hereby warrant them sound in body and mind, and the title good, which I will warrant and defend;" which said last-mentioned writing obligatory is shown to the court here, the date whereof is the 4th day of Oct., A. D. 1860. And the said defendant says, the said sum of four thousand five hundred dollars, the receipt whereof is acknowledged by the said plaintiff in the said last-mentioned writing obligatory, is the same secured by the said writing obligatory, in his said declaration men-
22 tioned; and the defendant says, notwithstanding the representation and covenant of the said plaintiff to and with the said Benjamin J. Jacoway, deceased, that said negro boys were slaves for life, and his further covenant to warrant and defend the title thereto, so made, as by his aforesaid certain writing obligatory appears afterwards, and after the decease of the said Benjamin J. Jacoway, and in the life time of the said negro boys, to wit, on the day of , A. D. 1864, they, the said negro boys, by the adoption and ratification of the constitution of the State of Arkansas, became and were made free, and from thence henceforward have been and remained free and independent persons; and so the said defendant says, that upon the emancipation and freedom of said negro boys, which he avers was done without compensation from the State, the covenant of the said plaintiff to and with his intestate, Benjamin J. Jacoway, so made as aforesaid, became and was broken, whereby the consideration of said writing obligatory in said plaintiff's declaration mentioned, wholly failed, and the obligation of the defendant to pay said sum of money became nugatory and void, and this the said defendant is ready to verify; wherefore he
23 prays judgment whether the said plaintiff ought to maintain his aforesaid action against him, in manner and form as he declared against him.

Plea No. 2.

And for a further plea in this behalf, the said defendant says actio non, because he says that the said writing obligatory in said plaintiff's declaration mentioned, was made, executed, and delivered to said plaintiff by his intestate, Benjamin J. Jacoway, on the said 4th day of October, A. D. 1860, for and in consideration of the sale and delivery to him by the said plaintiff of three negro boys named Henry, Gum, and Jeff, and the said plaintiff, on said 4th day of October, A. D. 1860, upon the sale and delivery of said negro boys, represented and covenanted to and with his intestate, the said Benjamin J. Jacoway, deceased, that said ne-

gro boys were slaves for life, by the making, execution, and delivery to him the said Benjamin J. Jacoway, deceased, his certain writing obligatory, bearing date the said 4th day of October, A. D. 1860, which said writing obligatory is shown to the court here in these words: "Rec'd of B. J. Jacoway, four thousand five hundred dollars in full
24 for three negro boys, slaves for life, to wit, Henry, aged about twenty-one; Gum, aged about eighteen; and Jeff, aged about seventeen. I hereby warrant them sound in body and mind, and the title good, which I will warrant and defend;" the consideration whereof was the making, execution, and delivery by his said intestate, Benjamin J. Jacoway, of said writing obligatory to the said plaintiff in his said declaration mentioned, the said sum of four thousand five hundred dollars, the receipt whereof is acknowledged by the said plaintiff in his said certain writing obligatory, being the same secured by the said writing obligatory in his said declaration mentioned. Yet the said defendant says, notwithstanding the representation and covenant of the said plaintiff to and with his intestate, Benjamin J. Jacoway, that said negro boys were slaves for life, in his said certain writing obligatory above set forth, the said negro boys were and did not remain slaves for life, but afterwards, after the deceased of his said intestate, and in the lifetime of said negro boys, on the day of , A. D, 186 , by the adoption and ratification of an amendment to the Constitution of
25 the United States, were and became free without compensation, and from thence hitherto have remained free, and still remain free and independent persons. And so the said defendant says that upon the emancipation and freedom of said negro boys as aforesaid, the covenant of the said plaintiff to and with his intestate that they were slaves for life, so made as aforesaid, was and become broken, whereby the consideration of said writings obligatory in said plaintiff's declaration mentioned wholly failed, and this he, the said defendant, is ready to verify, wherefore he prays judgment if the said plaintiff ought to have and maintain his aforementioned action against him, &c.

JORDAN E. CRAVENS,
Att'y for Defendant.

STATE OF ARKANSAS, *County of Yell:*

I, William D. Jacoway, defendant in the above-entitled cause, do solemnly swear that the matters and things set out in the two foregoing and hereto annexed pleas are true in substance and in fact; so help me God.

W. D. JACOWAY.

26 Subscribed and sworn to before me this the 17th day of Sept., 1867.

JOHN F. CHOATE, *Clerk.*

(Endorsement:) Filed in open court this 11th Sept., A. D. 1867.
JOHN F. CHOATE, *Clerk.*

Cause continued.

MONDAY, *Sept. 16th*, A. D. 1867.

TILFORD DENTON
vs.
M. D. JACOWAY, AS ADM'R, &C. } Assumpsit.

Now on this day the parties hereto, by their attorneys, appeared in open court, and by agreement this cause is continued until the next term

hereof, and leave granted the defendant until the third day of the next term hereof to file additional and amended pleas herein.

Cause continued.

TUESDAY MORNING, *March* 10*th*, 1868.

TILFORD DENTON
vs.
W. D. JACOWAY, ADM'R. } Narr. in debt.

27 On this day comes the parties by their respective attorneys, when upon motion the court continued this cause until the next term hereof.

Margaret Jacoway made defendant, &c.

WEDNESDAY, *Nov.* 11*th*, 1868.

TILFORD DENTON
v.
WILLIAM D. JACOWAY, AS ADM'R OF ESTATE of Benjamin J. Jacoway, dec'd. } Narr. in debt.

And now, on this day, it being shown to the court here that William D. Jacoway has ceased to be the administrator of the estate of said Benjamin J. Jacoway, and that Margaret Jacoway has succeeded him in the administration of the same, it is therefore ordered by the court that said Margaret Jacoway, as administrator de bonis non of the estate of Benjamin J. Jacoway, be, and she is hereby, substituted for and in the stead of said William D. Jacoway, as defendant herein, and said defendant by her attorney asked and obtained leave of the court to file additional and amended pleas herein.

Plea filed—demurrer.

TUESDAY, *Nov.* 12*th*, 1868.

TILFORD DENTON
vs.
MARGARET JACOWAY, ADM. DE BONIS NON, &C. } Narr. in debt.

28 Come the parties by their respective attorneys, when defendant, by attorney, filed plea in bar, when plaintiff demurred to said plea in short upon the record by consent.

3rd plea.

STATE OF ARKANSAS, *County of Yell:*

In the Yell circuit court, Nov'r term, A. D. 1868.

MARGARET JACOWAY, AS ADM'X DE BONIS NON estate Benjamin J. Jacoway, dec'd,
agt.
TILFORD DENTON.

Comes said defendant and defends, &c., and for a further plea in this behalf, by leave of the court first had and obtained, says actio non, because she says that the said writing obligatory in said plaintiff's declara-

tion mentioned was made, executed, and delivered by her intestate, Benjamin J. Jacoway, to said plaintiff, on said 4th day of Oct., A. D. 1860, at the county of Crawford, in the State of Arkansas, for the purchase price of three certain slaves, then and there sold by said plaintiff to her said intestate, Benjamin J. Jacoway, and for no other or further
29 consideration, and so she says the said writing obligatory so executed as aforesaid for the purchase price of slaves is null and void, and this she is ready to verify. Wherefore, she prays judgment whether the court shall take cognizance of this cause, and said plaintiff have and recover in his aforesaid action against her, &c.

CRAVENS,
Att'y for Defendant.

STATE OF ARKANSAS, *County of Yell:*

I, William D. Jacoway, do solemnly swear that the matters and things set forth in the foregoing plea by said Margaret Jacoway, as ad'r'x, &c., are true in substance and in fact; so help me God.

W. D. JACOWAY.

Subscribed and sworn to before me Nov. 12th, 1868.

JOHN F. CHOATE, *Clk.*

(Endorsement:) Filed in open court this 12th Nov'r, 1868.

JOHN F. CHOATE, *Clerk.*

Cause continued.

THURSDAY, *Nov'r 19th*, 1869.

30 TILFORD DENTON, PL'FF,
v.
MARGARET JACOWAY, A. D. B. N., DEF'T.

Come said parties by their respective attorneys, and by consent this cause is continued till the next term of this court.

TUESDAY, *May 4th*, 1869.

TILFORD DENTON
vs.
MARGARET JACOWAY, AS ADMINISTRATOR DE bonis non of the estate of Benjamin J. Jacoway, dec'd. } Debt.

Come the parties by their respective attorneys, whereupon the said plaintiff interposed his general demurrer to said defendant's three several pleas in bar, to which said defendant entered her joinder, all by consent of parties in short upon the record.

Demurrer sustained & judgment for plaintiff.

WEDNESDAY, *May 5th*, 1869.

TILFORD DENTON
vs.
MARGARET JACOWAY, ADMINISTRATRIX DE bonis non of the estate of Benjamin J. Jacoway, dec'd. } Debt.

31 Comes the parties by their respective attorneys, when the demur-

rer heretofore interposed to defendant's three several pleas in bar come on to be heard, whereupon the court here, after hearing the argument of counsel, and being well and sufficiently advised of the law in the premises, doth sustain said demurrer; and the said defendant saying nothing further in bar of said plaintiff's action, but electing to rest, the plaintiff produced to the court here a copy of the writing obligatory sued on, duly sworn to according to law, which give to the court sufficient evidence that said defendant as such administratrix is justly indebted to said plaintiff in the sum of forty-five hundred dollars, and that said plaintiff has sustained damages by reason of the non-payment of said debt the sum of thirty-four hundred and twelve dollars.

It is therefore considered by the court that said plaintiff have and recover of and from said defendant, as such administratrix, the said sum of forty-five hundred dollars for his debt aforesaid, and the further sum of thirty-four hundred and twelve dollars for his damages sustained as aforesaid, and that said debt and damages, amounting in the ag-
32 gregate to the sum of seventy-nine hundred and twelve dollars, bear interest at the rate of ten per cent. per annum from this date, May 5th, 1869, until paid.

It is further ordered by the court that said plaintiff recover of said defendant, as such administratrix, all his costs herein expended.

Appeal granted.

TUESDAY, *May* 11*th*, 1869.

TILFORD DENTON, PLAINTIFF, *vs.* MARGARET JACOWAY, ADM'R'X DE BONIS non of the estate of Benjamin J. Jacoway, dec'd, defendant.	Debt.

On motion of Margaret Jacoway, administratrix de bonis non of the estate of Benjamin J. Jacoway, deceased, defendant, an appeal to the supreme court is granted her from the judgment entered herein at the present term of this court.

STATE OF ARKANSAS, *County of Yell, ss:*

I, John F. Choate, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the preceding twenty-one pages, numbered from one to twenty-one inclusive, contain a full
33 and complete transcript of the record and proceedings in the cause therein mentioned.

In testimony whereof I have hereunto set my hand as such clerk, and affixed the seal of said court, at office, in the town of Danville, this 31st day of May, A. D. 1869.

[L. S.]

JOHN F. CHOATE,
Clerk of Yell Circuit Court.

And afterwards, on a further day of said term, to wit, on the 27th day of January, 1870, of said supreme court, the following proceedings were had, to wit:

MARGARET JACOWAY, ADM'R'X OF THE ESTATE of Benj. J. Jacoway, dec'd, appellant, *v.* TILFORD DENTON, AP'ELLEE.	Appeal from Yell circuit court.

This cause came on to be heard upon the transcript of the record of

the circuit court of Yell County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

34 It is therefore considered by the court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this court in this cause expended, and have execution thereof.

STATE OF ARKANSAS, *set:*

I, N. W. Cox, clerk of the supreme court of the State of Arkansas, certify that the above and foregoing twenty-three pages of manuscript contain a full, true, and complete transcript of the record and proceedings in the case of Margaret Jacoway, adm'x of Benj. J. Jacoway, dec'd, vs. Tilford Denton, as the same is of record and on file in my office.

In testimony whereof I have hereunto set my hand and official , as such clerk, at Little Rock, this 16th day of June, A. D. 1870.

[SEAL.] N. W. COX, *Clerk.*

(Indorsement on cover:) No. 460. Margaret Jacoway, adm'x of Benjamin J. Jacoway, dec'd, plaintiff in error, vs. Tilford Denton. Arkansas sup. court.

Filed 27 June, 1870.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1871.

No. 45.

GEORGE J. PUMPELLY,
Plaintiff in Error,

vs.

GREEN BAY & MISSISSIPPI CANAL COMPANY.
Defendant in Error.

Abstract and Brief.

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Attorneys for Defendant in Error.

H. L. PALMER,
Of Counsel.

Evening Wisconsin Print, Milwaukee.

Supreme Court of the United States.

GEORGE J. PUMPELLY,
Plaintiffs in Error,
vs
GREEN BAY & MISSISSIPPI CANAL COMPANY.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

This action is trespass. The declaration contains three counts.

First Count—The first alleges that the plaintiff was lawfully possessed of six hundred and forty acres of land, situated in the county of Fond du Lac. That the defendant was engaged in "making, erecting and building a dam across the north channel of the Fox River, or outlet of Lake Winnebago, on the north side of Doty Island;" that on the 1st August, 1861, and other days and times between then and the 1st August, 1867, the defendant so "carelessly, negligently, unskillfully, inartificially and improperly made, erected and built, kept and continued said dam," that by reason thereof the waters in said north channel and in Lake Winnebago overflowed portions of plaintiff's land, and continued so to do for six years, and the land was thereby injured, and timber, grass and hay thereon were destroyed.

Second Count—The second count is substantially like the first, except that it alleges that the lands of plaintiff were susceptible of cultivation, and would grow products of the value of $5,000 per annum, and that the defendant kept and continued, and caused to be kept and continued, a dam which had been theretofore wrongfully erected across the North Branch of the Fox River, at the outlet of Lake Winnebago, by means of which the waters of Lake Winnebago overflowed plaintiff's lands, and injured them, and hindered and prevented him from cultivating them.

Third Count—The third count alleges that plaintiff was seized and possessed of the said lands, which were of great value for pasturage, cultivation and tillage. That the defendant, from 1st August, 1861, to the commencement of this suit, kept and continued, and caused to be kept and continued, a dam across the north channel of Fox River, at the outlet of Lake Winnebago, before then wrongfully erected by means whereof the waters of Lake Winnebago were wrongfully forced and thrown back upon and overflowed plaintiff's land, and injured them and the plaintiff was thereby annoyed, hindered and prevented from tilling, cultivating using and improving them as he otherwise would have done

To this declaration six pleas were interposed. The demurres filed by the plaintiff, to the second, fourth and sixth pleas having been overuled in the court below, the remaining pleas were withdrawn and judgment was entered for the defendant.

We proceed to consider such questions only as arise upon the demurrers to those pleas.

SECOND PLEA.

The second plea sets up the following facts, viz:

An act of the Legislature of the Territory of Wisconsin approved on the 10th March, 1848, (and which is set out in the plea) authorized Curtis Reed and his associates to construct a dam across the north channel or outlet of Winnebago Lake on fractions of section 22, township 20 north of range 17 east, and to make use of the waters of said river for hydraulic purposes, said dam not to exceed seven feet in hight above high water mark of said river. *Provided*, That said dam should not raise the water in Lake Winnebago above its ordinary level, and the said Curtis, Reed and his associates, his heirs and assigns to be subject to, and entitled to, all the benefits and provisions of the act relating to mills and mill-dams approved January 13th, 1840. That Reed and Doty (who was associated) with him undertook and began the building of said dam at the place in said act and in the declaration designated and which became and was and is the same dam mentioned in the declaration. That after the admission of the state of Wisconsin into the Union and after the acceptance of the grant of land made by Congresss to aid in the improvement of the Fox and Wisconsin rivers, and on the 8th of August, 1848, an act was passed by the Legislature of Wisconsin to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal. That in pursuance of the last mentioned act, a Board of Public Works was duly organized who undertook the duties and trusts devolved upon them. That in the execution of their duties and trusts, the Board of Public Works contracted with Reed and Doty to complete said

dam, which, when completed, was to belong to the state but was to be thereafter maintained and kept in repair by Reed and Doty and their assigns of the water power created by said dam; and that by said contract, Reed and Doty conveyed to the state, subject to their right to the water power, the said dam and all their right, title and interest in or to the same, and all rights, interests and privileges asquired and to be acquired by them under and by virtue of the said act of the 10th March, 1848. In pursuance of said contract, Reed and Doty continued the erection of the dam and completed it in or prior to 1852, and when completed the dam was built to a height no greater than that authorized by the act of March 10th, 1848; that all the provisions of the several acts aforesaid were complied with, and that Reed and Doty under said acts were authorized to build and complete the dam in all respects as the same was built. That the dam has ever since been and now is maintained at the same height and in the same manner, and to no greater height and in no different manner, than that to which and in which it was originally built, and is the only dam on the north channel of the Fox River and the same one mentioned in the declaration. That about the same time, a dam was built by other parties across the south channel, on the south side of the Island mentioned in the declaration, which has been maintained ever since. That by means of these two dams the waters of said River and Lake Winnebago were made to overflow the plaintiff's premises, at the times in the declaration mentioned, and to effect the damages therein set forth, and which are the same trespasses complained of. That pursuant to an act of the Legislature of Wisconsin, "to incorpo-

" rate an association for the completion of the improvement "of the Fox and Wisconsin Rivers," approved July 6, 1853, the Fox and Wisconsin Improvement Company was duly organized and complied with all the conditions of the Act last mentioned; that by said last mentioned Act, said company was required to construct, repair and maintain said dam, and the State thereby granted and conveyed to said company the dam aforesaid, the privilege of constructing and repairing the same, and all other rights and privileges belonging to the improvement, including the dam, to the extent that the State then held or might exercise such rights, by virtue of the Act approved August 8, 1848, and the several Acts supplementary thereto, subject to certain provisions and conditions contained in the Act of July 6, 1853; that all the provisos and conditions in the Act of July 6, 1853, and the Acts amendatory thereof, were duly and fully kept and performed by said company, and the property, rights, franchises and privileges described in said Acts became vested in said company; that pursuant to an Act "to facilitate the sale of the lands and other property of the Fox and Wisconsin Improvement Company, to provide for the proper application of the proceeds of such sale, and to authorize the formation of a company by the purchasers," approved April 13, 1861, and the Acts amendatory thereof, the defendant became, about the 15th of August, 1866, a corporation, and fulfilled and performed all the conditions required by the Acts last aforesaid; that on or about the 16th of August, 1866, the defendant received a conveyance of, and became seized of, said dam, with the privilege of constructing and repairing the same, and all other rights and privileges belonging to the im-

provement, including the dam, which the Fox and Wisconsin Improvement Company had at any time held or acquired; that the dam was constructed and has been maintained as aforesaid, and since the date last aforesaid, viz: 16th of August, 1866, under and by authority of this defendant.

It is respectfully submitted that these facts being admitted by the demurrer, constitute a defense to this action.

I.

By section two of "An Act to authorize the construction of a dam across the North Branch of Fox River," approved March 10, 1848, it is expressly provided that "the said "Curtis Reed and his associates, their heirs and assigns, "shall be subject to and entitled to all the benefits and "provisions of the Act relating to mills and mill-dams, "approved January 13, 1840."

Laws of Wisconsin, 1848, p. 129.

The Act to which reference is thus made in section two of the Act of the 10th of March, 1848, is No. 48 of the Laws of the Territory of Wisconsin, entitled "An Act in relation to mills and mill-dams," (*Laws of Wisconsin*, 1840, p. 65), and is substantially re-enacted as Chapter 56 of the Revised Statutes of Wisconsin, entitled, "Of mills and mill-dams."

Revised Statutes of Wisconsin, 1858, p. 398.

This Act provided a special remedy for all persons whose lands are overflowed or otherwise injured by mill-dams. Sec. 4 is as follows:

"SEC. 4. Any person whose land is overflowed or other-"wise injured by such dam may obtain compensation there-"for upon his complaint before the District Court for the

"county where the land, or any part thereof, lies; provided, "that no compensation shall be awarded for any damages "sustained more than three years before the institution of "the suit." Sections 5 to 27, inclusive, provide for the manner of prosecuting the suit, the form, effect and mode of enforcing the judgment, and for appeals and proceedings thereon.

Ssection 28 is as follows:

"Sec. 28. No action shall be sustained at Common Law "for the recovery of damages for the erecting, maintaining "or using any mill or mill-dam except as provided in this "act."

The corresponding sections in chapter 56 of the Revised Statutes of 1858, are substantially the same.

Compare No. 48 *laws of* 1840 p. 65 and
Chap. 56 *R. S.* 1858, p. 398.

It has been determined by the Supreme Court of Wisconsin, that "The law relating to mill dams in this state (i. e. "the act of 1840 referred to above) is not in violation of "the Constitution nor of the ordinance of 1787."

Newcomb vs. Smith, 1 *Chandler's Rep.* 71.

The decision of the court in Newcomb vs. Smith was considered and followed by the same court in *Stevens vs. Marshall*, 3 *Chandler*, 222; *Fisher vs. The Horicon Iron Manufacturing Company*, 10 Wisconsin Reports, 351, and again in *Nowell vs. Smith*, 15 Wisconsin, 101.

In the latter case the Court says: "It is true we have "quite recently affirmed the constitutionality of the mill "dam law * * * as an original question we should "be unwilling to declare that the taking of property for "the purpose of overflow by the waters of a mill-dam was

"taking it for *public use*. By the adjudications of this court "it has been settled that it was. We have no intention "of unsettling and over throwing those decisions."

Babb vs. Mackey, 10 *Wisconsin*, 371.

The validity of the mill-dam law as passed in 1840, and re-enacted in 1858, is no longer an open question in Wisconsin. The highest judicial tribunal of that state having determined that it was within the constitutional power of the Legislature to pass these statutes, that question must be regarded as settled there; and, according to a familiar principle, the adjudications of that tribunal on that quesiion have become rules of decision to be applied by this court to the same question when presented here.

It is true, the mill-dam laws of Wisconsin by their terms apply only to dams erected upon streams not navigable, but in this case we are relieved of all difficulty on that account by the fact that the Act of the 10th March, 1848, applies the provisions of the Act of 1840, relating to mills and mill-dams, to the parties authorized to construct and maintain the dam in question, and to the dam thereby authorized to be erected.

It is respectfully submitted that the mill-dam Act of 1840 was thereby made a part and parcel of the Act of March 10, 1848, to authorize the construction of a dam across the North Branch of the Fox River, as completely and effectually as if the entire Act had been incorporated in and re-enacted as a part of the Act of 1848.

Wood vs. Hustis, 17 Wis., R. 416.

It is proper to say that the Act of 1840, in relation to mill-dams, continued in force until January 1, 1850, when it was repealed, but was again re-enacted as a part of the

Revised Statutes in 1858, since when it has remained in force. This repeal does not, however, affect the question here. This has been twice determined by the Supreme Court of Wisconsin.

Wood vs. Hustis, 17 Wisconsin, R. 416.

In this case, in speaking of the mill-dam Act, the Court says: "But, although that law was not applicable, for the reason that the stream was not navigable, it was for another reason, which is, that it was expressly made so by the special Act authorizing the erection of this dam. (*Laws of* 1845, p. 99.) It is there provided that this dam shall be subject to all the provisions of an Act of the Legislative Assembly of the Territory of Wisconsin, approved January 13, 1840, which was the previously existing mill-dam law. This incorporates the provisions of that law, including those relating to the remedies of owners whose lands might be flowed, into the special Act, and makes them applicable to this dam. It follows that the issue attempted to be made in respect to the navigability in fact of the stream was wholly immaterial. Even though navigable in fact, the Legislature had expressly extended to this particular dam the provisions of the general law, otherwise applicable only to streams not navigable. Those provisions would remain in force in respect to this dam, even though the general law should be repealed. And the result is that the plaintiff could not maintain his common law action, but would be driven to the remedy provided by that Act."

Crosby vs. Smith, 19 Wis., 449.

We quote from the opioion of Dixon, Chief Justice, on the motion for a re-hearing, on page 453.

"We doubt whether this action can be maintained, and "in justification of our doubts, may with propriety refer to "the case of Hustis vs. Wood, 17 Wis., 416, which seem de- "cisive of the leading question argued here. We there held "that the appeal of the general mill-dam law of 1840 did "not effect the rights of the proprietors of a dam erected "under a special act into which the provisions of the gen- "eral law were incorporated by reference, and that a com- "mon law action for damages to lands flowed could not be "maintained."

In *Sika vs. Chicago & Northwestern Railway Co.*, 21 Wis., 370, the same principle is again affirmed. We quote a single paragraph from the opinion of the Chief Justice on page 371. "A statute which referes to and adopts the "provisions of another statute, is not repealed by the subse- "quent repeal of the statute adopted. Wood vs. Hustis, "17 Wis 416; 19 Wis., 453. Chapter 64, laws of 1859, "adopted the notice required by section 3, of chapter 134, "laws of 1858 (R. S. p. 818). The repeal of section 3 by "chapter 116, laws of 1864, does not obviate the necessity "of giving the notice prescribed by that section in the "cases provided for in chapter 64."

2. The mill-dam Act of 1840 having provided a special remedy for injuries sustained by the owners of lands over-flowed by mill-dams, the remedy thus provided is the only one available to the land-owner, and excludes all others.

Where a special remedy is given by the charter of a railroad company to recover compensation for private property taken for the use of the company, that remedy only can be pursued.

Pettibone vs. La C. & M. R. R. Co., 14 Wis., 443 and 448.

Ford vs. Ch. & Northwestern R. R. Co, 14 id., 609, 617.

See also *Babb vs. Mackey*, 10 id., 371, 377.

In the last case cited, which was an action for damages sustained by the plaintiff by reason of the building and maintaining of a dam across Baraboo River, the defendant pleaded, by way of defense, the Act which authorized the erection of the dam, and which Act provided a mode of ascertaining damages resulting from the overflow of lands. The Court says: "Assuming that the general mill-dam law "is constitutional, it would seem to follow that this is so. "By this Act and Chap. 167 of the Private Laws of 1857, "387, amendatory thereof, the right of the respondent to "maintain this action is taken away, and he must pursue "his remedy for any damages he has sustained in conform-"ity to those enactments."

II.

The Fox River, being a public, navigable river, *prima facie* and of common right belongs to the sovereign power,

and the State of Wisconsin now holds this river for purposes of navigation, and therefore, upon well established principles of law, may rightfully do everything for the full enjoyment of their rights by the public, not inconsistent with the constitutional principle that private property cannot be taken for public use without just compensation.

It is declared to be a common highway and forever free by Article IV. of the ordinance of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio.

By Section 12 of the Act of Congress, entitled "An Act establishing the territorial government of Wisconsin," approved April 20, 1836 (5 *U. S. Stat. at Large*, p. 10), the inhabitants of said territory are declared to be entitled to enjoy all the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the ordinance of 1787.

It is again recognized as navigable and declared to be a public highway and forever free by Section 3 of the Act, of Aug. 6, 1846, to enable the people of Wisconsin Territory to form a Constitution and State government, and for the admission of such State into the Union, (9 *U. S. Stat. at Large, p.* 56); and a like recognition and declaration is incorporated into the Constitution of the State of Wisconsin. Section 1, of Art. IX, provides that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways and forever free."

Rev. Stat. of Wis. 1858, *p.* 40.

And by Section 1 of the Act of Aug. 8, 1846, "to grant "a certain quantity of land to aid in the improvement of "the Fox and Wisconsin Rivers and to connect the same "by a canal in the territory of Wisconsin," it is provided that "the said rivers when improved, and the said canal "when finished, shall be and forever remain a public high-"way;" and the said act granted to the State of Wisconsin on its admission into the Union, for the purpose of improving the navigation of the Fox and Wisconsin Rivers, a quantity of public land, equal to one-half of three sections on each side of said Fox River and the Lakes through which it passed, from its mouth to the point where the Portage Canal should enter the same

9 *U. S. Stat. at Large*, 83.

The grant made by the Act of Congress of 8th of Aug. 1846, was formally accepted by an Act of the Legislature of the State of Wisconsin, approved June 29th, 1848.

Laws of Wisconsin, 1848, p. 16.

"An Act to provide for the Improvement of the Fox and Wisconsin Rivers," approved August 8, 1848, was passed by the Legislature of that State, and provided for the improvement of the navigation of the Fox River, through the agency of a Board of Public Works, established for that purpose, and for disposing of and applying the proceeds of the public lands granted by Congress to that object.

Laws of Wisconsin, 1848, p. 58.

Congress subsequently passed an Act authorizing the State to select the balance of the land to which it was entitled under the Act of 8th August, 1846, for the improvement of the Fox and Wisconsin Rivers, out of any unsold lands in said State. 10 U. S. Stat. at large 345, and

on the 3d of March 1855, passed a joint resolution explanatory of said Act, delcaring that the same should be construed "to give" to Wisconsin in aid of the improvement of the navigation of the Fox and Wisconsin Rivers a quantity of land equal mile for mile of its improvement to that granted to Indiana, under the provisions of the Act of Congress approved May 9th, 1848.

10 *U. S. Stat. at Large*, 724.

Section 12 of Chapter 340 of the Laws of 1852, provided for the prosecution and completion of such improvement.

Laws of Wis., 1852, 513 and 517.

Chapter 98 of the General Laws of 1853 provided for the incorporation of the Fox and Wisconsin Improvement Company, and granted to said corporation the improvement and appurtenances and the right of the State to the same, "and all privileges of constructing said works and repair. "ing the same, and all other rights and privileges belonging "to the improvement, to the same extent and in the same "manner that the State now holds or may exercise such "rights by virtue of the Acts" therein referred to; "pro- "vided, that said improvement shall in all future time be "free for the transportation of the troops of the United "States and their munitions of war, without the payment of "any tolls whatever;" and provided further, that the Act "should not be so construed "as to allow, permit or author- "ize the charge or collection of any tolls or transit duties "for the passage of any vessel, goods or merchandise, or "property of any kind, along or over the main channel of "said rivers;" and also provided for the transfer to said company of the lands granted by Congress to aid in said

improvement; and that the State might thereafter become the owner and proprietor of said improvement.

General Laws of Wis., 1853, p. 92.

Chapter 572 of the Private and Local Laws of 1866 provided for the organization of the Green Bay and Mississippi Canal Company, and in addition to the powers and privileges previously granted to and conferred upon the Fox and Wisconsin Improvement Company, authorized the said company "to enlarge and increase the capacity of said "works and of the said rivers, so as to make a uniform "steamship navigation from the Mississippi River to Green "Bay, or to surrender the same to the United States for "such enlargement, on such terms as may be approved by "the Governor for the time being of the State."

Pr. and Local Laws, 1866. pp 1,404 and 1,405.

By an Act "for the improvement of water communica-"tion between the Mississippi River and Lake Michigan, "by the Wisconsin and Fox Rivers," approved July 7, 1870, the Secretary of War is authorized to adopt a plan for the improvement of the navigation of Wisconsin River, and also to ascertain the sum which ought in justice to be paid to the Green Bay and Mississippi Canal Company as an equivalent for the transfer of the line of water communication from the Wisconsin River to the mouth of the Fox River, and to join the said company in an arbitration for that purpose, in order to enable Congress to elect to take such property for the Government, on making an appropriation to pay the award.

Laws of the U. S., 1st Session, 41st Cong., Gov't edition, 151.

In view of the legislation of the Congress of the United

States and of the Legislature of the State of Wisconsin, to which we have referred, it is respectfully submitted, that the character of the Fox River as a commom public highway and a public navigable river is fully established.

2. The lands of individuals bounded on this public navigable river and on the lakes through which it runs and which form a part of it, were granted to those individuals or those under whom they claim, by the State or National Government; but neither the State; nor the Government thereby divested itself of the right and power of improving the navigation of the River, for such grants are to be construed most favorably for the public and against the grantee; and the public being the owner of this river, have an unquestionable right to improve the navigation of it without any liability for remote and consequential damages to individuals.

Hollister vs. The Union Co., 9 Conn., 435.
Lansing vs. Smith, 8 Cowen, 146.

In this case the statute of New York authorized the construction of a Basin in the Hudson River, in the city of Albany, and erections whereby the docks etc., of the plaintiff and other individual owners wererendered inaccessible and less easily approached by vessels, and were therefore much depreciated in value, it was determined that the Act, although it provided no compensation for such injury, was not unconstutional, either as taking private property for public use without compensation, or as imparing the obligation of contracts. That the plaintiff had not at Common Law as owner of the adjacent soil, nor by virtue of a grant from the State for land under water opposite to the shore

and under which he claimed, a right "to the natural flow "of the river with which the State had no right to inter- "fere by any erection in the bed of the river or in any "other manner." The Court say of the claim of such a right by the plaintiff: "This proposition appears to the "Court too extravagant to be seriously maintained. *It de-* "*nies to the State the power of improving the navigation of* "*the River, by dams or any other erections which must* "*affect the natural flow of the stream, without the consent of* "*all the proprietors of the adjacent shore, within there motest* "*limits which may be affected by the operation.* * * The "right of the plaintiff to navigate to and from his dock is "not denied. All that is contended for by the defendant is "that the mode in which that right is to be exercised is "subject to be controlled and regulated by the Legislature "as in their judgment the interest and convenience of "the public may be required. * * Every great public "improvement must, almost of necessity, more or less affect "individual convenience and property; and when the injury is "remote and consequential it is *damnum absque injuria* and "is to be borne as a part of the price to be paid for the ad- "vantages of the social condition." This case further holds that in the grant of the title to lands from the State, con- "sidered as a contract, "there was no implied promise on "the part of the State not to erect nor to afford facilities "for others," to erect rival establishments like the pier with greater facilities for the transaction of business and that "the granting of a part of the land which belonged "to them under water could afford no foundation for the "inference that they (the State) intended in any manner to

"restrict or impair their right to dispose of or improve the "residue."

McKeen vs. the Delaware Division Canal Company 49 *Penn. State Rep.* 424.

This was an action to recover damages for injuries alleged to have been sustained by plaintiff by reason of the erection of a dam across the Lehigh River by the defendant, for the purpose of improving the navigation of the river, which caused the water to flow back into plaintiff's mill-race, and thereby injured his fall and water power. The Court held that to back water upon the plaintiff's property, whereby his fall of water was lessened, was but the common case of a consequential injury, and that the injury "which followed "the raising of the water in the stream to improve naviga- "tion was not a taking of his property, but one merely "consequential, which he must suffer without compensation, "unless the State should choose out of grace to concede it. "Every one who buys property on a navigable stream pur- "chases subject to the superior rights of the commonwealth "to regulate and improve it for the benefit of all her citi- "zens."

See also *Monongahela Navigation Co. vs. Coons*, 6 *Watts and Seargent*, 101.

Susquehannah Canal Co. vs. Wright, 9 *Watts and S.*, 9.

Philadelphia & Trenton R. R. Co., 6 *Whart.*, 25.

Henry vs. Pittsburgh and Allegheny Bridge Co, 8 *Watts and S*, 85.

Monongahela Navigation Co. vs. Coons, 6 *Bar.*, 379.

Mifflin vs. Railroad Co., 4 *Harris*, 182.

N. Y. & Erie R. R. Co. vs. Young, 9 *Casey*, 175.

Monongahela Bridge Co. vs. Kirke, 46 *Penn. St.*, 112.

Walton vs. P. & C. R. R. Co., 1 *Wright*, 469.

Shunk vs. Schuylkill Nav. Co., 14 *Serg. and Rawle*, 71.

These cases from Pennsylvania, we think, are approved and followed by this Court in

Rundle vs. Delaware and Raritan Canal Co., 14 *Howard Rep.*, 80.

Canal Appraisers vs. The People, 17 *Wend.*, 571.

In this case it was determined that "if, in the improve-"ment of the navigation of a public river, the waters of a "tributary stream are so much raised as to destroy a valua-"ble mill site situated thereon, and the stream be generally "navigable, although not so at the particular locality of the "mill site, the owner is not entitled to damages within the "provisions of the canal laws, directing compensation to "be made for private property taken for public use."

To the same effect is *The People vs. The Canal Appraisers*, decided by the Court of Appeals of New York in 1865. (33 *N. Y.*, 461.) Davies, J., in the opinion of the Court, says, "that I do not place an incorrect estimate upon this "decision in 17th Wendell. I quote a note of Chancellor "Kent (3d Commentaries, 549.) He says, in the case of "*Canal Appraisers vs. The People*, 17 Wendell, 571, the "judgment of the Supreme Court of New York (13 Wen-"dell, 355) was reversed, and the right of the State over

"waters above the flow of the sea, for all public purposes "in derogation of individual rights, was declared. All "rivers in fact navigable were deemed public rivers and "subservient to public use." And again: "I am compelled, "therefore, to regard the principles there enunciated as the "settled law of this State. And I have the less hesitation "in doing so, as I believe that doctrine to be sound and "impregnable, and in accordance with the expressed will "of the Legislature, and the early and uniform practice of "the State, and the better decisions of the Courts of this "State, and of other States, and of the United States."

See opinion p. 500.

See also *Bellinger vs. the N Y. Central R. R.*, 23 *N. Y.*, 42.

Fitchburg R. R. Co., vs. Boston & Maine R. R. Co., 3 *Cushing*, 58.

We quote a single paragraph from the opinion of Shaw, C. J., on p. 88.

"But we are satisfied that the instructions authorized the "jury to give damages for loss occasioned to the petitioners "by the erection of a dam and piers made by the respond- "ents according to an Act of the Legislature on the channel "of Charles River, by which the course of the currents "was changed, and additional sea-wall and piling made "necessary to secure the petititioner's land. This direction "we think, was incorrect. It is incident to the power of "the Legislature to regulate a navigable stream so as best "to promote the public convenience, and if in doing so, "some damage is done to riparian proprietors and some in- "creased pressure thrown upon them it is *damnum absque* "*injuria*."

Com'rs. of Homochitto vs. Withers 29, *Missi.* 21.

The case was this:

The complainant owned a plantation on what was called Old River, being a former bed of the Mississippi River, but cut off in 1796. The Homochitto River empties its waters into Old River at a point above plaintiff's plantation, and its waters at ordinary low stage of Mississirpi River passed through Old River, removing the deposits of mud and flowed into the Mississippi, keeping open an outlet to said river which was greatly beneficial to the complainant and others owning plantations on said river. The Legislature passed an Act for the improvement of the navigation of the Homochitto River, and the commissioners appointed for that purpose, proceeded to construct a canal, whereby its waters would be divrerted from the channel of Old River, on which complainant's plantation was situated; and he had enjoyed the privilege of said waters from time immorial. On appeal from decree of the court below, overruling the demurrer to the bill, the decree was reversed and the demurrer sustained and the bill dismissed.

We quote from the opinion of the Court on page 37:

"Upon due consideration, we are of opinion that the "doctrine that the rule of the common law is not applica- "ble to our large public rivers used for navigation—that "the rights of the owners of the lands bounded by such "streams are subordinate to the right and power of the "State to use and appropriate them to the public good in "promotion of navigation, and that such rivers, whether "tide waters or not, are, as to the jurisdiction and power "of the State, to be considered as navigable rivers—is sup-

"ported by the sounder reason, and should be established "as the law of the land."

Hanson vs. La Fayette, 18 *Louisiana, R.*, 295.

Natchitoches vs. Coe, 3 *Martin L. A N. S.*, 140.

Alexander vs. The City of Milwaukee, 16 *Wisconsin* 247, is to the same effect. Plaintiff owned lots on the Milwaukee River, on which he had erected docks and established a shipyard. The city, under legislative authority, constructed the existing "straight cut" harbor for the purpose of improving navigation and promoting the interests of commerce. By reason of the construction of the harbor, the waters of the lake were from time to time driven through the cut and upon and over the plaintiff's premises, washed away his buildings, materials and portions of the lots, and filled up the channel of the river opposite the plaintiff's premises, so as to render it useless, and substantially destroyed his shipyard. The action was to recover the damages thus sustained. The Supreme Court held that the city was not liable for the consequential damages produced by the improvement to property, in the vicinity of such improvement, no part of which was taken or used therefor; and "that the making "of a public improvement in the vicinity of private prop- "erty, which is incidentally injured thereby, or diminished "in volume, but no part of which is taken or used for such "improvement, is not a taking of private property for pub- "lic use, within the meaning of the Constitution."

Bailey vs. Railroad Co., 4 *Harrington*, 389, 395, 396, 397, 398.

Sedgwick on Dam., 3d ed., 113, 114.

3 It seemes to us clear, from the authorities cited, that the State may, in the interest of the public, erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.

The State may employ such agency as it may choose for improving a navigable river, and the agent acting within the scope of the authority conferred by the State, stands in the place of the State and is subjected to no greater liability.

In this case whatever has been done by way of improving the Fox River; whatever has been done by way of erecting and maintaining the dam in question, has been done by the State itself or by its express authority. The State had charge of the work from 1848 to 1853; the Fox and Wisconsin Improvement Company, from 1853 to 1866, and the Green Bay and Mississippi Canal Company, from 1866 until the present time. The dam in question was commenced by Reed and Doty, and was completed in or prior to 1852 by the State, and was erected, and has been maintained at no greater heighth than was authorized by the State. No liability therefore attaches to the defendants for the alleged injury to the plaintiff's lands. His lands were not taken or appropriated. They are situated at a great distance tance from the dam and are only affected by the overflow occasioned by raising the water in Lake Winnebago. Whatever may be the extent of this injury, it is remote, and consequential and without remedy.

4. The legislation of the State of Wisconsin, which provided for the improvement of the Fox and Wisconsin Rivers, did not provide that compensation should be made for such injuries as those set forth in the declaration, while the work was being prosecuted by the State, and did not impose any such burden upon the Fox and Wisconsin Improvement Company, or upon its successor, the Green Bay and Mississippi Canal Company.

It is true that Sec. 17 of the Act of August 8, 1848, to provide for the improvement of the Fox and Wisconsin Rivers [*Laws of Wis.*, 1848, p. 62], provided that "when "any lands, waters or material appropriated by the Board "to the use of the public in the construction of said im- "provements," should not be freely given or granted to the State, and the Board of Public Works could not agree with the owner, appraisers might be selected, who should assess the "benefits or damages," as the case might be, to the owner, from the "appropriation of such land, water or materials," such damage to be paid "out of the fund appropriated to said improvement."

Laws 1848, p. 58, Sec. 17–21, pp. 62, 63.

The compensation thus provided for is limited to compensation for "lands, waters or materials *appropriated by* "*the Board to the public use in the construction of the said* "*improvements.*" The lands of the plaintiff were not thus appropriated, and the damages sustained by his lands, if any, are not such as entitle him to compensation under the provisions of Section 17.

It was optional with the State to provide for compensating such injuries as those of which the plaintiff complains, or not.

McKeen vs. Delaware D. Canal Co., 49 *Pem. St.*, 424, 439.

Hollister vs. Union Co., 9 *Conn.*, 435, and cases cited.

But it will probably be claimed by the plaintiff that the clause in the act of Aug. 8th, 1848, relating to compensation, is unconstitutional and void.

If void, it was simply an ineffectual attempt on the part of the State to grant compensation in a case in which the land-owner had no legal right to it; and the State rested under no obligation to make it.

The clause in question if it can be construed to include such injuries as those complained of, is doubtless void for another reason. It requires the Board of Public Works to pay the compensation "out of the fund appropriated to said improvement." The fund "appropriated to said improvement," consisted of the lands granted by Congress for that purpose, by the Act of August 8th, 1846, all of which were by said Act to be applied to the purpose contemplated in said Act and none other; that is to "improving the navigation of the Fox and Wisconsin Rivers," etc., and not to the payment of remote and consequential damages, to lands bordering on the river and lakes, occasioned by flowage. If the claim of the land owner for compensation is not a legal right, then to devote the proceeds of the land to the payment of such a claim, would be a misapplication of the fund.

It will be observed, also, that the act transferring the works of the improvement, to the Fox and Wisconsin Improvement Company, provided that the Company should

have all the privileges for constructing said work and repairing the same, that the State itself possessed.

Laws of Wis., 1853, Sec. 2, Chap. 98, p. 93.

4. By the several Acts of the Legislature of Wisconsin relating to the improvement of the Fox and Wisconsin Rivers, and the Act incorporating the Green Bay and Mississippi Canal Company, the Fox and Wisconsin Improvement Company was, and the defendant is, required to maintain the dam in question as it was built by the State. An action of trespass ought not to lie, for the performance of a duty imposed upon the company by the State. If the defendant fails to maintain the dam, the improvement becomes useless, the navigation of the river is greatly impaired, and the defendant becomes liable to the State. Can it be said that if the defendant maintains the dam in accordance with its obligations to the State, it thereby becomes liable to the plaintiff? It seems to us not.

5. The proviso contained in Section 2 of the Act of the 10th March, 1848, authorizing Reed and his associates to build the dam, should not be so construed as to defeat the object of the Act. The proper construction to be given to the Act is one which will, if possible, permit both the grant

and the proviso to stand. In order that the grant may stand, permission must be given to raise the water at the dam sufficiently high for hydraulic purposes; and in order that the proviso may stand in connection with the grant, it is necessary that the waters in the lake be not raised above the point where the "piling up of water" ceases; consequently the proper construction to be applied is that the dam may be raised to a point not exceeding seven feet in height above high water mark, and not exceeding a point at which, the water at the top of the dam, will not be raised above the ordinary level of the waters of Lake Winnebago. In other words, the Act authorizes such injuries as may result from the "piling up" of the waters in the lake, and prohibits such greater injuries as may result from raising the waters in the lake above their ordinary level by means of a dam which will raise the water at its top above the ordinary level of the lake.

The intention of the Legislature is clearly expressed, to authorize the erection of the dam, and the use of the waters for hydraulic purposes. The erection of the dam and the use of the water for the purpose designated in the Act was, and was intended to be, beneficial to the public. While the language of the proviso is plain, its meaning is ambiguous, and we are left in doubt as to what the intention of the Legislature was, in using it. If the proviso is ambiguous, the whole Act is to be so construed as to give effect to the grant, clearly expressed in the first section, and such a construction sustains the right to build and maintain the dam at the height of seven feet.

State vs. Williams, 8 *Indiana*, 191.

Ingraham vs. Speed, 30 *Miss.*, 410.

Blunt vs. Walker, 11 *Wis.*, 334.

Monongahala Bridge Co, vs. Kirk, 46 *Penn. St.*, 112.

The facts of this case furnish an apt illustration that the construction contended for, is the proper one and should be applied. The point where the dam was built was at least one mile distant from the point where the outlet or north channel leaves Lake Winnebago. The natural fall in said channel from the point where it leaves the lake, down to the dam, is at least eight feet below high-water mark, and the current was free and rapid. The fact was, and is, that placing a dam across said channel not high enough to serve any hydraulic or useful purposes would nevertheless cause the waters to "pile up" in Lake Winnebago to some extent above its ordinary level.

To verify this statement, we refer to "Encyclopedia Britanica," head "Hydronamics."

The same point is also illustrated, though not fully, by the effects of the tides. For example, Troy is 151 miles in distance from, and 147 feet in altitude, above the waters of the Hudson River at its mouth. The spring tide rises but five feet four inches, and the neap tide three feet four inches at the mouth of the river, and yet the tide is preceptably felt at Troy.

A portion of this effect may be attributed to the lunar wave, but it is also in part, indubitably due to the causes referred to above.

6. But whatever construction may be given to the Act of March 10, 1848, or the proviso contained in it, the grant of lands made by Congress to the State of Wiscousin, was made "for the purpose of improving the navigation of the Fox and Wisconsin Rivers." The State having accepted the grant, undertook the work of making improvements of the Wisconsin and Fox Rivers, "so as to make said streams navigable."

Section 5, *Act Aug.* 8, 1848, *Laws of Wisconsin*, 1848, *pp.* 58, 59.

And for that purpose the State, as we have shown, was authorized to erect such dams and other works as would accomplish that object; and notwithstanding the State had acquired the rights and privileges granted to Reed and his associates in respect to the dam; the State itself, was in no wise subject to, nor controlled by the restriction, if any, imposed upon Reed and his associates by the proviso. And the defendant by the subsequent legislation to which we have referred, as the successor of the Fox and Wisconsin Improvement Company, having acquired all the rights, powers and priviliges which the State possessed in respect to the improvement was and is authorized and bound to do all that the State was bound to do in the premises: that is, to make such improvements and to

maintain such dams, as would render the rivers in question navigable; and in so doing, would be subject to no greater or other liability than would have attached to the State had it retained its proprietorship and possession of the improvement.

FOURTH PLEA.

The fourth plea sets forth the legislation authorizing the erection of the dam, and the improvement of the river for the purposes of navigation; the title of the defendant to the improvement and its privileges and duties in relation thereto, substantially as in the second plea: and alleges that the dam was completed in or about the year 1852; that the State, by its Board of Public Works, seized so much of plaintiff's land as is overflowed and as was necessary for said improvement, and ever since the completion of the dam in 1852 the State, its successors and the defendant, have held, and the defendant now holds, the same. That such seizure was made under claim and color of right and title, by virtue of the laws of Wisconsin; was made publicly and notoriously, and with the knowledge and acquiescence of the plaintiff, and under like claim and color, and in like manner, the same has since been held; that the plaintiff, at the time of such seizure, was seized in fee and was in possession of the land described in the declaration, subject to the rights acquired by the State by its seizure and possession; that during all said time—i. e.

since the completion of the dam in 1852—the plaintiff has been under no disability which disabled him from bringing suit.

I.

If the overflow of so much of the plaintiff's premises, as were necessarily overflowed, in order to render the improvement effectual, was a taking of such lands in the exercise of the right of eminent domain, it became a seizure and was perfect as such, from and after 1852; and it was contended below and was held by the Court that it was, and that the right to retain the same had become perfect by prescription.

The taking (so far as this plea goes) was not under the mill-dam Act, but under the Act of August 8, 1848, appointing the Board of Public Works. We have already shown, and suppose it will be conceded, that the provision contained in the Act referred to for making compensation was void. If so, the original taking in this case was hostile to the plaintiff's title, unless as we have contended, such taking was the exercise of the paramount right of the State, to which the plaintiff's title, was subordinate.

Section 6 of Chapter 138, of the Revised Statutes of Wisconsin, provides as follows:

"Whenever it shall appear that the occupant, or those "under whom he claims, entered into the possession of any "premises under claim of title, exclusive of any other right, "founding such claim upon some written instrument, as be- "ing a conveyance of the premises in question, or upon the "judgmeat of some competent court, and that there has "been a continual occupation and possession of the premi-

"ses included in such instrument or judgment, or of some "part of such premises, under such claim for ten years, the "premises so included shall be deemed to have been held "adversly: except that when the premises so included con- "sist of a tract divided into lots, the possession of one lot "shall not be deemed the possession of any other lot in the "same tract."

Section 10, of the same chapter is as follows:

"Section 10. An adverse possession of ten years, under "the sixth and seventh sections, or of twenty years under "the eighth and ninth sections of this chapter, shall consti- "tute a bar to an action for the recovery of such real "estate so held adversely, or of the possession thereof."

Rev. Stat. Wisconsin, 819, 820.

The "taking" in this case was by the Board of Public Works, under Section 15 of the Act of August 8, 1848, which is as follows:

"Sec. 15. In the construction of such improvements the "said Board shall have power to enter on, take possession "of, and use all lands, waters and materials, the appropria- "tion of which for the use of such works of improvement "shall in their judgment be necessary."

Laws of Wis., 1848, *p.* 61–2.

Such taking was under claim of title. The grant of the State on which such claim was founded was a "written instrument," within the meaning of Sec. 6 of the Revised Statutes, and one of quite as high authority as a deed or judgment. The possession of the Board of Public Works or of the State, and their successors, has been continuous, under the same authority, and adverse to the plaintiff.

In analogy to the statute of limitations, the right or title by prescription will mature and become effectual in the same period of time required to bar an action.

"That a grant will be presumed, by analogy to the stat-"ute of limitations, after twenty years peaceable and unin-"terrupted adverse enjoyment, is too well settled to admit "of controversy."

Rooker vs. Perkins, 14 *Wis.*, 79, 82.

In an action to abate a mill-dam within the city of Janesville, where the complaint showed that the dam had been maintained for ten years, and did not show any excuse or justification for the acquiescence of the plaintiff during that time, it was held that the plaintiffs were not entitled to the relief sought.

Crosby vs. Smith, 19 *Wis.*, 449.

Sheldon vs. Rockwell, 9 *Wis.*, 166.

Shrunk vs. Schuylkill Nav. Co., 14 *Sergt. and Rawle*, 71.

Cooper vs. Smith, 9 *Sergt. and Rawle*, 26, 33.

Strickler vs. Todd, 10 *Sergt. and Rawle*, 63.

Ingraham vs. Hutchinson, 2 *Conn.*, 584.

Whatever may be said of the seizure and occupation by the State, the Act of July 6, 1853 (*Laws of Wis.*, 1853, 92,) granted the improvement, "together with all and sin-"gular the rights of way, dams, locks, canals, water power, "and other appurtenances of said works, * * and all "other rights and privileges belonging to the improvement, "to the *same extent* and in the same manner that the State "now hold or may exercise such rights," by virtue of the

Acts aforesaid—that is, the Act of Aug. 8, 1848, and the several Acts amendatory thereof.

Sec. 2, *Ch.* 98, *Laws of Wis.*, 1853, *p.* 93.

This Act, it is submitted, brough the Fox and Wisconsin Improvement Company, and the defendant as its successor, within the operation of Sections 6 and 10 of Chap. 138 of the Revised Statutes, above cited; and under this grant the defendant and its grantor, the Fox and Wisconsin Improvement Company, have enjoyed uninterrupted possession of the dam, improvements, and other works, the waters, and the lands overflowed by water, in their present state and condition, for over eighteen years. The plaintiff cannot maintain an action to compel the removal of the dam. If the defendants title has, by this user, acquired a strenth sufficient to enable it to successfully resist an action to abate the dam, it is insisted that it affords a good and sufficient answer to the present action.

SIXTH PLEA.

The sixth plea alleges that by the ordinance of 1787, the act of Congress of August 7, 1789; the act of Congress establishing the territorial government of Wisconsin, the act admitting the State of Wisconson into the Union, the Constitution of the State of Wisconsin, and the laws of the United States and of the State of Wisconsin, it is declared that the navigable waters leading into the Mississippi and

St. Lawrence and the carrying places, etc., shall be common highways and for ever free.

That the Fox and Wisconsin Rivers and Lake Winnebago are and ever have been navigable waters, and of the navigable waters referred to in the laws above mentioned.

The Fox River is a navigable water leading into the St; Lawrence.

The plea then sets out the legislaton in regard to the improvement, the incorporation of the Fox and Wisconsin Improvement Company, the organization, incorporation and title of the defendant, as before set forth, and further alleges, that the dam in question was undertaken, built, completed, maintained and continued under the authority of the laws of the United States and of the State of Wisconsin, and the Board of Public Works.

That the dam as constructed and maintained, was and is, an essential, necessary and integral portion of the works, for the improvement of the navigability of the Fox and Wisconsin Rivers, and to the proper development and enlargement, of their capacity as common navigable highways.

That the ordinance, the laws of Congress and of the State, granted and assigned to the defendant, the improvement and the easement, right and privilege of overflowing, etc, the lands described in the declaration, to the extent necessary to improve the navigability of said Rivers; * and that the original grantor of the lands, described in the declaration, and all the subsequent grantees thereof, including the plaintiff, purchased with full notice of, and subject to, the easement and right aforesaid, and which easment and right was granted to the State, prior to the original grant

of title to plaintiff's land which is alleged to have been in 1849.

I.

In considering the questions raised by the demurrer to this plea, we are relieved from all discussion, as to whether the Fox River is a navigable stream and a common and public highway. It is alleged that it was and is so in *law* and in *fact*, and these allegations are admitted by the demurrer.

For all the the purposes of this case, then the Fox River was a navigable river. It necessarily follows:

a. That it belongs to the Sovereign Power; the state of Wisconsin.

b. That the lands owned by individuals, bounded on this public navigable river, are held subject to the right and power vested in the State, to improve the navigaiion of the river. Although these lands have been granted by the General Government, or by the State, to the present owners or their grantors, yet the paramount right and power of the State to improve the navigation of the river, were not thereby divested.

Hollister vs. Union Co., 9 *Conn.*, 435, 442.

East Haven vs. Hemingway, 7 *Conn.*, 186, 199.

The Elsebe 5, *C. Robinson's Adm. Rep.* 173, 182.

c. That the public, being the owner of the river, have an unqu stionable right, to improve the navigation of it,

without any liability for remote and consequential damages to individuals.

d. If the State might improve the navigation of the river without liability to individuals for remote and consequential damages, its successors, the Fox and Wisconsin Improvement Company and the Green Bay and Mississippi Canal Company, acting under ample authority from the State, might also do that, without incurring liability for such damages.

e. The damages complained of are remote and consequential, and therefore the plea under consideration is a complete bar to the plaintiff's action.

In support of these several propositions, we respectfully refer the Court to the authorities cited in support of the same points, made upon the Second Plea. Also to

Radcliff vs. Mayor, &c., of Brooklyn, 4 *Comstock*, 195.

1 *Am. Law Reg.* (*April to Nov.*, 1843,) 52, *et sequitur.*

Hooker vs. The New Haven and Northampton Co., 14 *Conn.*, 146.

This case comments upon, and, as we understand it, affirms the doctrine held in

Hollister vs. Union Co., 9 *Conn.*, 435.

See opinion of the Court on page 160.

U. S. vs. The New Bedford Bridge, 1 *Wood, and M.*, 401.

2. The ~~Second~~ Plea is further strengthened by the fact therein stated, that the lands described were patented to the original patentee in May, 1849, after the dam had been authorized, and after the State had commenced the improvement of the river, and was subject to the easement or right of the State, thereupon reserved, and previous thereto granted to, or acquired by the State; and by the further fact that all subsequent grantees of said lands, including the plaintiff, purchased with full notice of the rights and easement of the State, and subject thereto.

We respectfully submit, that upon the whole case, both upon principle and authority, the plaintiff is not entitled to maintain this action, and that the judgment of the Circuit Court should be affirmed.

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